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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Decided on : 12th March, 2013

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W.P.(C) 4794/2007

EX.CONST.KAILASH CHANDER

..... Petitioner

Through: Mr. N.D. Kaushik, Advocate

versus

UOI & ORS.

..... Respondent

Through: Ms. Barkha Babbar, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The petitioner, who is a serving employee of the Border Security Force (BSF), challenges his dismissal order made on 9.9.2005, pursuant to an incident which is alleged to have occurred on 5.9.2005. He joined the BSF as a constable on 14.04.1998. On the date of the incident, i.e. 5.9.2005, the petitioner's Battalion was deployed at the Indo-Bangladesh Border, in Assam at Madhopur. According to the allegations leveled by the BSF at around 2-2.30 p.m. on that date, when the petitioner and another constable, PW-4 Ct. Mahabir Singh, were taking refreshment, he (the petitioner),

apparently in an intoxicated state, tried to compel a young woman (the complainant, Mrs. Aliya Vishwash Mandal, PW-1) to consume cold drink and sweets. At this stage, it would be relevant to reproduce the charges leveled against the petitioner; they are extracted as below:

“IST CHARGE

BSF ACT – 1968, SEC-26

INTOXICATION

in that he,

at Bangoan on 05.09.05 at 1400 hrs was found in a state of intoxication.

IInd CHARGE

BSF ACT – 1968, SECTION-40

AN OMISSION PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE

in that he,

while at 1400 hrs at Bangaon alongwith No. 99722675 Constable Mahavir Singh created a scene in public by forcing Mrs. Aliya Mondal W/O Md Sahidul Mondal R/O Chakla Distt-24 Parganas (N) to have drinks & sweets with them thereby damaging the image of the Force.”

2. Before the Summary Security Force Court (SSFC) proceedings held on 9.9.2005, the petitioner entered the plea of not guilty. Consequently, the respondent/BSF relied upon the testimonies of witnesses, which included amongst others the complainant (PW-1), the Shopkeeper (PW-2) in whose premises the incident occurred, a Doctor and a Constable Mahabir Singh, who was with the petitioner at that time.

3. Learned counsel for the petitioner argued that the dismissal order is untenable in this case. He submitted that the petitioner’s representations to the authorities about his false implication went unheeded.

4. Elaborating on this, it was urged that the petitioner had caught some people unauthorisedly crossing the Indo Bangladeshi Border and helped the authorities to expose a racket, which directly resulted in his false implication. Counsel also emphasizes the fact that the record nowhere discloses that the petitioner had in any manner misbehaved with the complainant, and on the contrary, the evidence pointed out to his treating her as his daughter, though she was reluctant to join them for a snack.
5. It was argued that having regard to the previous record of the petitioner's service, even if the allegations contained in the charges were treated as having been proved, the extreme punishment of dismissal was harsh and oppressive and, in any event, disproportionate. Learned counsel relied upon the evidence led before the SSFC and also on his plea before the authorities as well as in appeal.
6. PW-1, Mrs. Aliya Vishwash Mandal, described the incident in her deposition in the SSFC proceedings, which is as follows:

“On 05th Sept, 2005, at about 1430 hrs, I along with my husband went to a Sweets Shop at Motiganj, Bangaon. When we were inside the shop, there we come across two personnel at the shop. Out of them, one person caught my hand and told me to join them for sweets and cold drinks. I now recognize and identify the same person, who is present before the Court as the accused. I denied his offer and objected to him. My husband also objected but accused threatened him to face the serious consequences, if he obstructed him. The accused caught my right hand and pulled me inside the shop, whereas my husband was pulling me from left hand to get me free from his clutches. There we were forced to sit down and in the mean time cold drinks and sweets were presented to us for which I kept on denying. But the accused was not ready to concede to my

repeated requests and forcing me to take the sweets and cold drinks. Then I requested him that if he is so keen to offer sweets and cold drinks, same may be given to her to take to residence for my children. But, accused was interested to join him. I was trying to get up from my seat and to move out of the shop, but every time I was made to sit down on the chair. During this time, the partner of the accused kept on persuading him not to force for taking sweets and drinks, if she was not interested. The accused press my forehead upwards and tried to pour cold drink bottle into my mouth despite my objection. In the mean time my father, who had gone to carry out his personal commitments in the market Bangaon, returned and joined us in the shop. When he witnessed the scene, he objected it to the accused and told him to leave his daughter. At this, the accused replied that she is my daughter not yours. When my father found himself helpless, he informed the civilians, who were around the shop, about the mis-behaviour with his daughter by the accused and his friend and he requested for the help. The public entered in the shop and tried to rescue me from the accused, but accused blocked the passage by spreading his legs. Anyhow I got free from him with the help of local people and went out of the shop. In the mean time, as both personnel came out from the shop, they were surrounded by the public and were beaten up.”

7. PW-2, the shopkeeper, Shri Paritosh Roy Chowdhury – an independent eye witness, deposed in corroboration of the allegations made by PW-1. Some questions were put to him by the Court with regard to whether the petitioner was in an intoxicated state. The relevant extract of his deposition are as follows:

“Sh Paritosh Roy Chowdhury, S/O Late Sh Kanhaiya Lal Chowdhury, R/O Motiganj, PS-Bangaon, Distt-24(N) Praganas, after being duly affirmed [Sec-85(2)], is examind by the Court:-

I am a shopkeeper by profession and I am running one shop of sweets and cold drinks at Motiganj, Bangaon. On 05th Sept, 2005, at about 1500 hrs, when one couple (husband and wife) after eating sweets, were leaving my shop, they come across with two personnel, who were entering my shop. Out of them, one person, to whom I now recognize and identify as the accused present before the Court, catch hold of hand of that female and told her, "BETI AAO HAMARE SATH MITHAI KHA LO". All four of them entered in my shop. The accused purchased one bottle of 600 Ml cold drink (Slice), four bottles of Pepsi (300 Ml each) and some sweets amounting to Rs. 52/- (Rupees fifty two). After some time, I heard some furore inside the shop while I was at the counter, when 4 to 5 people went inside the shop. I witnessed that accused was forcible trying to pour cold drink bottle into that women's mouth persistently. I could not see what all happened inside the shop from the counter, but I could make out that some misbehavior with the women has taken place. I went to them and found that the accused and the group of 4 to 5 people were having arguments with each other over that female. I requested all of them to move out of my shop, as it will adversely affect the reputation of my shop. The accused paid the bill of the sweets and drink and move out of the shop. I could see that at about 20 to 30 Mtrs from my shop, some scuffle was taking place.

Questions by the Court

A-1 I could make out from the physical bearing and the on going conversation that they were from Border Security Force.

A-2 I can confidently say that the accused was drunk by the way of his stammering voice, uncontrolled physical movements and abnormal behavior. Whereas, another person who was along with him, was behaving in a very normal condition."

8. Constable Mahabir Singh, PW-4, who had accompanied the petitioner, too was examined before the SSFC. He gave a slightly different version. But at the same time, he corroborated the evidence of PW-1 and

PW-2 as regards the escalation of the incidents which led to his as well as the petitioner being beaten up by the crowd. The relevant extracts of his deposition are as follows:

“No. 99722675 CT Mahabir Singh (Hindu), ‘A’ Coy, 104 Bn BSF, Kalyani after being duly affirmed [Sec-85(2)], is examined by the Court :-

..... At about 1430 hrs, we reached at Motiganj bus stand-Bangaon for boarding into the bus for Madhopur. At the bus stand, we decided to go to a sweet shop, which was nearby for taking cold drinks. The lady was known to the accused. The accused requested the lady to join them for sweets and cold drinks in the shop. She denied the offer. After persuasion from the accused, the couple agreed to join them for sweets and cold drinks. In the mean time, cold drinks and sweets were purchased and offered to them. She again denied not to have anything because they (both) had already taken sweets from the same shop. I tried to convince the accused not to insist them to eat and take sweets and cold drinks respectively. Later on, the accused catch hold of her hand and forced her to take the bottle of cold drink. The lady and her husband accepted the offer and took cold drinks offered to them. In the mean time, the husband of the lady got up from his seat and complaint something against us to 5 to 6 person, who were standing outside the shop. At the same time, the father of that female also came to her and directed her daughter to follow him to move outside. The accused told to her father of the female in the words, “YEH AGAR AAPKI BETI HAI TO MERI BHI BETI HAIO”. We all moved out of the shop after paying the bill. The father of that woman took her daughter and son-in-law along with him. We also started moving toward the bus stand. Hardly we have covered 10 to 15 yards of the distance, the crowd surrounded both of us. The crowd, which was comprising of more than 50 people, started beating both of us for enforcing the woman to have cold drinks and sweets. After at about 1530 hrs, one police party arrived at the place of incident and pursued us to

move to the police station since situation was serious at POO.....”

9. The Doctor, who deposed as PW-8, apparently had examined the petitioner at 10 p.m. The result of his conclusion was referred to by him in the SSFC proceedings; he concluded that the blood pressure, pulse and other vital parameters of the petitioner were abnormal. He also stated that the petitioner was in an intoxicated state.

10. The above discussion of the evidence would reveal that even if the complainant's testimony were to be rejected, the independent eye witness, i.e. PW-2, the Shopkeeper, deposed in corroboration of the allegations leveled in the present case. He clearly stated that the petitioner tried to ask the complainant to join him and his colleague for a snack, whereas she was reluctant. Crucially, he stated that having witnessed that “accused was forcibly trying to pour cold drink bottle into that woman's mouth persistently..... I could make out that some misbehaviour with the woman has taken place. I went to them and found that the accused and the group of 4 to 5 people were having arguments with each other over that female.”

11. The testimony of PW-2 also corroborates with his contemporaneous observation that the petitioner appeared to be in an intoxicated state. An overall analysis of the testimonies of the witnesses – including PW-4, whose deposition varied to a certain extent as regards what happened, persuades this Court that the petitioner's protestation about his false implication is baseless.

12. The petitioner's reliance upon the testimony of PW-4, in the opinion of this Court, is unpersuasive. It is a matter of record that PW-4 too was

charged for the offence and had to suffer 42 days rigorous imprisonment. Obviously, his version, which was coloured and slanted, in essence proves that the testimonies of PW-1, PW-2 and PW-4 corroborated each other, i.e. about the incident, reluctance of the complainant to agree to the petitioner's advances, his attempting to force her to comply with his wishes and argument or altercation involving a few persons – possibly PW-1's husband; the escalation of the incident and violence in which the petitioner and PW-4 were beaten up.

13. From this analysis, it is apparent that the incident alleged against the petitioner occurred in the manner described and the conclusion of guilt recorded by the SSFC was warranted and based on facts.

14. Coming to the petitioner's submission of being unfairly targeted due to his being instrumental in exposing an illegal crossing of the border, this Court notices that in the very first instance, when he was called upon to state something in his defence, no such plea was entered. This is evident from the following statement made during the SSFC proceedings after the conclusion of evidence, akin to the statement made under Section 313 Cr.P.C. The extract of the statement is as follows:

“Answer by the accused

A-4 ‘Yes’

The accused No 88944362 Constable Kailash Chander of ‘A’-Coy, 104 Bn BSF, says that:-

It is humbly requested and pleaded before the Hon'ble Court that before giving any judgment against me, the livelihood of my two children and wife, who is suffering from

the heart ailment, may be kept in mind. I would like to exhort and request earnestly before the Hon'ble Court that I may be awarded even 80 or 89 days RI instead of severe punishment since I have served this organization for the best of my abilities for about 18 years."

15. Apart from the above, the petitioner was not consistent in the allegations of his being unfairly targeted on account of his nabbing the illegal immigrants. Furthermore, the deposition of PW-1 does not, in any manner, try to implicate any other BSF personnel. Were there some truth in the petitioner's complaint of unfair treatment, there was no reason for the public witnesses, PW-1, or for that matter PW-2, to only target the petitioner and not anyone else; not even the petitioner's colleague who was present with him at the time of the incident. In view of this discussion, the Court is of the opinion that the argument about his being treated unfairly on account of him performing his duties legitimately, is baseless and is unacceptable.

16. As regards the submission that the punishment in this case was highly disproportionate, this Court notices that the facts had all the elements of a full blown border incident which appears to have excited the local population into beating up the BSF personnel. The civilian authorities had to step in and aid the force to quell the situation.

17. In view of these facts and the nature of his behavior – least expected of a constable in the Force with over 17 years of experience, this Court is of the view that the punishment of this proportion, though severe from the petitioner's point of view, cannot fall within the description of "shockingly disproportionate" so as to warrant intervention under Article 226 of the constitution of India.

18. All that this Court can do, however, is that if the petitioner is advised to, and chooses to, approach the respondents for grant of compassionate pension in terms of Rule 41 of the CCS (Pension) Rules or any other applicable Rule, the entire record of the petitioner's previous service as well as the nature and circumstances under which he seeks to approach for the grant of such relief shall be considered on their own merits and reply shall be directly communicated to him within four weeks on the receipt of such representation.

19. This writ petition is dismissed, subject to the preceding direction with regard to the consideration of the petitioner's application for compassionate pension, in the above terms.

S. RAVINDRA BHAT
(Judge)

SUDERSHAN KUMAR MISRA
(Judge)

MARCH 12, 2013
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